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October 3, 2007

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

EX PARTE NOTICE

Re: ***In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593**

Dear Ms. Dortch:

Level 3 Communications, LLC has a strong interest in the outcome of this proceeding. We operate one of the nation's largest interexchange and local exchange networks, and believe firmly in the benefits of facilities-based competition. At the same time, we are well aware of the challenges of extending networks to buildings across the country. We are heavily dependent on local exchange carrier special access services to reach our customers with efficient and competitive service offerings.

Level 3 is sympathetic to the challenges facing the Commission at this time. We agree that the existing pricing flexibility rules do not work. At the same time, rational new rules require adequate data (and data analysis) at the wire center and building level. While various parties have provided various data sets, none of them are likely to give the Commission the ability to define final rules correcting this problem.

Meanwhile, Level 3 believes that ILEC special access prices may (in the absence of some interim relief) increase. Even though nominal rates may not increase, effective rates may increase because the volume and term discounts may be reduced, sometimes precipitously, from prior levels. While we would have preferred to resolve this issue through commercial negotiation, we are increasingly convinced that some interim regulatory action is needed.

Level 3 therefore suggests that the Commission consider the attached proposal, which has two key elements. First, the Commission would commit to promptly use its investigative power to examine the special access market at the same level used in the RBOC merger reviews and other proceedings – namely, the wire center and building level. This investigation could be completed in approximately one year. Second, the Commission would impose a "true freeze" on current special access rates during this period. Under a "true freeze," special access customers would have the option of extending their current contracts and current discount levels on the same commercial terms. Of course, ILECs and their customers would be free to negotiate lower pricing. But at least this "true freeze" would eliminate effective rate increases and prevent the special access situation from worsening during the next year.

Some may believe that more stringent interim relief is warranted. While there is certainly a basis to argue for more robust interim relief, a "true freeze" is a simple solution that will not prejudge the regulation that the Commission finds warranted based on the actual market power issues present at the wire center and building level.

We hope that the attached proposal is useful to the Commission as it considers this issue. We are willing to meet to answer any questions or discuss our proposal in more detail.

Sincerely,

John Ryan
Assistant Chief Legal Officer

Attachment

cc: Ian Dillner
John Hunter
Scott Bergmann
Chris Moore
Scott Deutchmann

October 3, 2007
Level 3 Communications, LLC

SPECIAL ACCESS REGULATION: BREAKING THE LOG JAM BASED ON REAL-WORLD DATA

I. Problems with the Existing Special Access Rules for Determining Competition

- Current FCC rules for determining competition in the special access marketplace do not produce a true and reliable picture of the extent of competition.

- The existing FCC method has two primary flaws:

  - The level of competition is measured by counting the number of fiber-based carriers collocated with the ILEC, rather than focusing on carriers that control and operate networks capable of actually delivering competitive services to end user buildings.

  - Once the collocation "trigger" is satisfied, competition is presumed to be present throughout the entire MSA, no matter how geographically limited the competing networks actually are.

- Counting the number of collocated carriers artificially inflates the appearance of competition, because many of those carriers may (a) have little or no network footprint within the area beyond the facilities to their respective collocation arrangements, and (b) largely "compete" with the ILEC by reselling ILEC services to extend from the collocation arrangements to their end users.

- Granting relief from competition throughout an entire MSA is in most instances too broad. Although competition might exist in the central business district of the MSA where multiple carriers may have multiple collocation arrangements, in many cases there is no competition for special access services outside of the central business district. Thus, ILECs are sometimes freed from economic regulation in large geographic areas where there is only a small pocket of ostensible competition.

- The Department of Justice ("DOJ") appropriately focused its evaluation when considering the potential competitive effects of the SBC/AT&T/BellSouth and Verizon/MCI transactions. DOJ looked at competition to serve specific buildings, finding that this was the appropriate geographic market for analysis. The FCC has adopted the same building-specific approach in its own merger reviews -- but those reviews properly did not consider the extent to which competition already was inadequate to buildings where the merger parties did not both have facilities. Thus, the most relevant market analysis, covering the vast proportion of the special access market, has yet to be done.

II. A Proposal for Change: Creating New Rules Based on Relevant Data

- The FCC clearly has the authority to demand that carriers collect and submit information that would reveal the true extent of facilities-based special access competition.[1] We believe that the extent of competition for special access services can be easily measured, if all carriers are required to cooperate.

- We propose a new process for measuring competition:

    - Measurement must be more granular – wire center by wire center instead of MSA-wide;
    - Measure true facilities-based competition based on a representative sampling of commercial buildings within each wire center;[2]
    - Ask each carrier if they *presently* have the capability, through network assets *controlled and operated by the carrier*, to deliver lit services (at varying capacities) to each sample building (i.e., is the building actually on-net to the carrier).[3]

- Once results are reviewed and analyzed, the FCC can determine what action to take and can tailor its relief to specific wire centers where competition actually exists. Preliminarily, Level 3 would expect that a percentage threshold would be established to determine whether some form of ILEC regulation is appropriate in that wire center.

    - For example, if more than X% of the sample buildings are served by competitive carriers capable of immediately delivering on-net service, the wire center would be declared "competitive" and ILECs would not be subject to price regulation. If less competition exists, regulation of some form would continue in the wire center.

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[1] We note that the kind of data referenced here was in fact collected by DOJ in connection with its evaluation of the MCI/Verizon and SBC/AT&T mergers.

[2] A building-specific analysis with respect to the state of competition in the special access services market is consistent with the approach traditionally adopted by the FCC. *See Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149 (rel. Aug. 20, 2007), at ¶ 35 (citations omitted).

[3] While we propose to limit carriers' responses so that they list only those buildings that they serve with facilities that they control and operate, it is possible to also consider "near-net" buildings in the evaluation if sufficient capacity demand exists in the building to justify construction of competitive facilities. The "demand/distance" screens used by the DOJ in the RBOC mergers, however, likely would require adjustment to reflect the true economics associated with decisions to expand metro networks into new buildings. Thus, while we have no objection to collection of data on "near-net" buildings as well (properly identified as such), the Commission will need to evaluate the relevance of that data in the next phase of developing new special access rules.

- The FCC also could consider other line-drawing approaches based on its evaluation of the data collected. There is no need to presently determine what those rules should be. Our main point is that new rules (whatever they are) should reflect actual market conditions – not generalized rhetoric about how competitive or non-competitive special access is or might be in the future.

- The FCC could collect the information on sample buildings by enlisting the assistance of state public utilities commissions, or could subpoena the information directly. Collecting and analyzing the information could be completed within 6 months. The data could then be made available for evaluation and comment, and appropriate regulations could be promulgated within 6 months thereafter.

- We propose that this information be collected initially with respect to wire centers in a representative sample of the largest MSAs to establish the rules and the appropriate thresholds for a determination that a wire center is "competitive." After data is initially collected, it could be updated either (a) at the request of an ILEC seeking relief in a wire-center, or (b) on a periodic schedule as determined by the FCC.

III. Interim Relief Pending Data Collection and Analysis: A "*True Freeze*"

- While more accurate and granular information on the state of competition is being collected, the FCC should implement (at a minimum)[4] a "*true freeze*" on ILEC special access rates. Without a *true freeze*, ILECs will have incentives to wield their increased pricing power to "reset the bar" on the level of pricing within the marketplace.

- A "*true freeze*" would mean that any customer of an ILEC would be permitted, during this interim period, to continue to purchase special access services at an effective rate (including all applicable discounts) that is no worse than the rate that is available today to that customer. Customers desiring to continue purchasing service at specified discount percentages would have to comply with all conditions (i.e., purchase commitments) applicable to those discounts.

- The existing special access price restrictions imposed as a result of the merger conditions have been characterized by many as a "freeze". The ILECs, however, would disagree with this characterization. While the merger conditions clearly restrict the ILEC's ability to increase "rack rates" for special access services, at least one ILEC has interpreted this restriction in a manner that permits the ILEC to significantly decrease or entirely eliminate applicable discounts upon expiration of a "contract tariff" term. Most large purchasers of special access services negotiate such "contract tariffs" that (based on volume and other commitments) guarantee a percentage discount off of tariff "rack rates" for a set duration. Reduction or elimination of these discounts effectively increases pricing just as effectively as an overall "rack rate" increase.

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[4] There may be other forms of interim relief that the FCC, based on the record before it, may find warranted. Our objective in making a "*true freeze*" proposal is simply to assure that, while additional and more precise information on competition is collected, market conditions for purchasers of special access services from ILECs do not worsen.

- In order to effect a *true freeze*, for the duration of the interim period, purchasers of ILEC special access services need to be assured that ILECs will not (a) increase overall tariff "rack rates"; or (b) reduce or eliminate the discount applicable to their contract tariffs. A *true freeze* means that ILECs must allow purchasers to renew contract tariff terms as they expire with discount percentages (assuming the same purchase commitments are met) that are no less than the discount percentages applicable to their current purchases.

- To be clear, the "*true freeze*" limits special access rate increases. ILECs would remain free to reduce rates under existing rules.

IV. The Bottom Line

- A "*true freeze*" is a reasonable, non-intrusive interim remedy.

- If, as the ILECs claim, the special access marketplace is highly competitive, ILECs would not likely increase rates or decrease discounts for fear of losing market share to competitors. They therefore should have no objection to this interim limitation.

- If, on the other hand, competition is not flourishing in the special access marketplace, a "*true freeze*" prevents the special access pricing situation from getting worse while meaningful data is collected.

- Once the FCC has received and evaluated relevant data, it can create better rules that neither overstate nor understate special access competition.